



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Legare Construction Company

File: B-257735

Date: November 4, 1994

J. Hatcher Graham, Esq., for the protester.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest is sustained where although protester's item price exceeded by a small amount the price limitation set forth in the solicitation for that item, its bid should not have been rejected since no showing has been made that the resulting bid was materially unbalanced or that either the government or the other bidders were prejudiced by the de minimus nature of the bidder's failure to price its bid in the manner required.

DECISION

Legare Construction Company protests the rejection of its bid under invitation for bids (IFB) No. 1443IB970094903, issued by the National Park Service (NPS) for the construction of employee housing at the Katmai National Park and Preserve, Bristol Bay Borough, Alaska. Legare's bid was rejected because the price it submitted on one item of its total base bid was greater than the amount permitted under the terms of the IFB. Legare maintains that either the limitation cannot be enforced or the amount by which the limit was exceeded cannot serve as a basis for the rejection due to its de minimus amount. In either case, Legare contends that it should receive the award under the IFB.

We sustain the protest.

The IFB required bidders to submit prices on a base bid and on two bid additives. They were advised that a failure to submit prices for all the items could result in the rejection of a bid as non-responsive. The base bid consisted of three separately priced items: site and utility work, fourplex (housing unit), and stabilization rock. Under the place on the pricing page where a bidder

was to insert a lump-sum price for the site and utility work was the notation "(NOT TO EXCEED 20% OF TOTAL BASE BID)". Award was to be made to "the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and price-related factors" The additives were not included in the award and are not an issue in this protest.

Eight bids were received. The three low bids on the base bid were submitted by Gilco Construction, Inc. (\$1,157,502); Legare (\$1,336,000); and DAR-CON Corporation (\$1,363,000). The low bid of Gilco was rejected after the agency determined that Gilco's bid bond was unacceptable. Legare's bid was rejected for failure to meet the IFB's price limitation because its \$280,500 price for the site and utility work item of the base bid item exceeded 20 percent of its total base bid by \$13,300. Award was made to DAR-CON. Performance has been suspended pending resolution of the protest.

The agency explains that it established the 20-percent limitation for the site and utility work item (by rounding upward the government estimate that the cost of this item should represent 17 percent of the total base bid) to preclude the potential for a front-loaded bid based on an inflated price for the site and utility work. The agency contends its rejection of Legare's bid was proper because all bidders must compete on an equal basis, only Legare ignored the 20-percent limitation, and other bidders would be prejudiced if Legare's bid were considered for award because Legare would be paid an amount in excess of 20 percent of the base bid earlier than would other bidders. The agency further explains that in order for Legare to bid its price of \$280,500 for the site and utility item and comply with the IFB's price limitation, it would have had to submit a total base bid of \$1,402,500, which would have been higher than the awardee's price. Accordingly, the agency does not believe that Legare's failure to comply with the limitation is de minimus or waivable.

To be responsive, the bid as submitted must represent an unequivocal offer to comply with the IFB's material terms. Federal Acquisition Regulation (FAR) § 14.404-2. However, where a discrepancy between what is required by a material requirement in a solicitation and what is promised is de minimus, it may be waived under FAR § 14.405 as a minor informality where acceptance of a deviating bid would result in a contract which would satisfy the government's actual

needs and would not prejudice any other bidder. George Hyman Constr. Co.; Blake Constr. Co., Inc., B-188603, June 15, 1977, 77-1 CPD ¶ 429; Arch Assocs., Inc., B-183364, Aug. 13, 1975, 75-2 CPD ¶ 106; see also Marco Equip., Inc.; Scientific Supply Co., 70 Comp. Gen. 219 (1991), 91-1 CPD ¶ 107.

Here, the agency does not state that acceptance of Legare's bid, as submitted, would not satisfy its actual requirements, and has made no attempt to show that the Legare bid was front-loaded to any degree that would require its rejection. See, e.g., ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142. In other words, the agency has not shown, and indeed the record does not suggest, that Legare's bid for the site and utility work does not reasonably represent its costs for the work, or that the price is too high for the work. Moreover, any cost to the government of having to pay Legare \$13,300 earlier than it otherwise would, could not in any conceivable manner approach the additional \$27,000 that it would have to pay under an award to DAR-CON. Thus, it is clear on this record that the government's needs will be met and that it will suffer no material adverse effect by acceptance of Legare's bid.

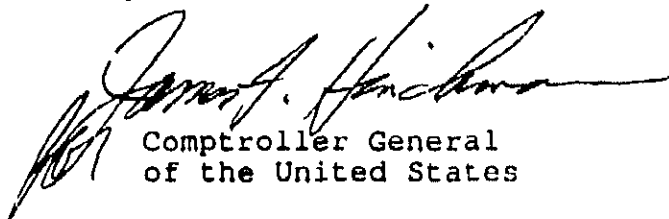
Similarly, acceptance of the protester's bid would not prejudice any other bidder. The \$13,300 deviation gave Legare no advantage over other bidders since any interest Legare would earn on that sum (or save by not having to borrow it) would not provide a basis for its being able to submit a bid \$27,000 lower than DAR-CON's.

Further, we do not find reasonable the agency's argument that had Legare complied with the 20-percent limitation, it would have bid a total price of \$1,402,500 in order to receive the additional \$13,300 (a total bid price which would have been higher than DAR-CON's). The agency assumes that Legare would add an additional \$66,500 to its total bid price simply to receive the additional \$13,300 for the site and utility work item. However, the agency does not challenge Legare's item prices or its total bid price as not reasonably reflecting the actual work requirements. Thus, under the circumstances, we consider it entirely unreasonable that Legare would have structured its bid as the agency assumes; rather, it is far more likely that Legare, had the firm realized that its item price for the site and utility work slightly exceeded the 20-percent price limitation, would have recalculated its individual item prices to comply with the 20-percent limitation without raising its total bid price.

Accordingly, the rejection of the firm's bid was improper. Therefore, we are recommending that the DAR-CON contract be terminated for convenience and that award be made to Legare.

Moretrench Envtl. Servs., Inc., B-248326.2, Sept. 10, 1992,
92-2 CPD ¶ 162. We also find that Legare should be awarded
the expenses it incurred in pursuing its protest, including
attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.



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